Filed 12/16/16 Pacific Interventionalists v. Pedes Orange County CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PACIFIC INTERVENTIONALISTS, INC.,	
Plaintiff and Respondent,	G052815
v.	(Super. Ct. No. 30-2014-00751574)
PEDES ORANGE COUNTY, INC.,	O P I N I O N
Defendant and Appellant.	

Appeal from an order of the Superior Court of Orange County, Peter J. Wilson, Judge. Affirmed.

Michelman & Robinson, Andrew H. Selesnick, Stacey L. Zill, Lydia E. Hachmeister and David Williams for Defendant and Appellant.

Berliner Legal Group and Matthew A. Berliner for Plaintiff and Respondent.

Pedes Orange County, Inc. (Pedes) appeals from the trial court's order denying its motion to compel arbitration. On appeal, Pedes maintains the court erred in concluding its oral contract with Pacific Interventionalists, Inc. (PI) continued to exist after the parties executed a written contract containing an arbitration provision. We conclude the trial court got it right, and we affirm the order denying arbitration.

I

PI is a professional medical corporation owned by three doctors, Todd Harris, Michael Arata, and Joseph Hewett. It provided both medical personnel and administrative staff to several different medical "access centers."

Hewett was also the majority shareholder in Pedes, a corporation that provided medical services to patients. In 2012, Pedes leased a new medical building from Pacific Medical Innovations.

In January 2012, when Pedes began its operations in the new medical building, Pedes and PI entered into an oral agreement that PI would provide physicians to perform medical services for Pedes's patients. Pedes agreed to compensate PI by paying 15 percent of Pedes's monthly net collections for those doctor's services and procedures from insurance companies, Medicare, patents, or other sources. The oral agreement, referred to by the parties as the Professional Services Agreement or "PSA," did not include any promise to arbitrate disputes.

A. The Underlying Action

In 2014, PI filed a breach of contract action against Pedes. PI alleged there were three categories of PI employees working in the new medical building. First, there were the group of PI employees performing administrative tasks such as answering phones and booking appointments. The second group performed both administrative and clinical functions such as nurses. And the third group was "at least one physician, Neil Goldstein" who performed surgeries on behalf of Pedes.

PI's complaint discussed the terms of the oral PSA, stating the "arrangement lasted until May 1, 2014, when PI stopped providing professional services to Pedes'[s] patients." It alleged Pedes initially asked PI to collect for its services because Pedes had neither insurance contracts nor Medicare billing mechanisms in place. Over time, Pedes obtained these contracts and began collecting directly from insurers and Medicare. PI complained Pedes failed to pay for all of Goldstein's services provided until April 30, 2014. It sought damages of approximately $150,000.

B. The Motion to Compel Arbitration

Pedes moved to compel arbitration and stay the action. It argued all of PI's claims were governed by a written agreement between the parties that contained an arbitration provision. In support of the motion, Hewett declared the following facts: On October 3, 2012, Hewett (on behalf of Pedes) and PI executed a written agreement called the "Employee Lease Agreement" (hereafter Payroll Agreement). It "governs PI's provision of personnel to be used by Pedes at the medical building . . . ." Hewett, who was involved in negotiating the terms of this agreement, was unaware of any facts that would support the conclusion the arbitration provision was unenforceable. The arbitration provision did not contain any mistakes or illegal provisions. It was also undisputed Harris was authorized to enter into the agreement on behalf of PI.

The Payroll Agreement contained the following arbitration provision: "10. Dispute Resolution. [¶] 10.1 If a controversy or claim arises out of or related to this Agreement, the parties agree to negotiate the controversy or claim in good faith for a period of thirty (30) days before legal proceedings or arbitration are instituted. [¶] 10.2 If there is no resolution of the claim or controversy through the procedure set forth in Section 10.1, the controversy or claim shall, at the request of either party, made before or after institution of legal proceedings, be determined by binding arbitration." Pedes argued PI's collection action regarding one of its physicians must be arbitrated because the dispute arose out of the Payroll Agreement.

The Payroll Agreement contained several recitals. The first recital of the contract stated, "Whereas, PI desires to provide certain personnel to [Pedes] at the building located [in] Newport Beach . . . ('Offices') and [Pedes] desires to obtain such personnel from PI at the Offices." Another recital stated the parties agreed their "Relationship" was as follows: "PI agrees to provide [Pedes] certain personnel at the Offices on a non-exclusive basis pursuant to the terms and conditions of this Agreement." PI and Pedes "are at all times acting and performing as independent contractors."

The parties defined "Personnel" in the contract, providing, "Pl shall provide to [Pedes] certain clerical and clinical personnel at the Offices. This shall include those personnel positions set forth in Exhibit B, which is attached to this Agreement and incorporated by reference into it. PI shall be responsible for the proper scheduling of such personnel [and] for the salaries, benefits, employment taxes, etc. of its personnel as well as all hiring and firing decisions related to such personnel. Exhibits A and B shall be automatically amended by the parties whenever additional personnel are requested by [Pedes] and added by PI." In a different provision, the parties clarified, "Except as specifically set forth . . . for Exhibits A and B when new personnel are added to this Agreement, no amendment to this Agreement shall be valid or enforceable unless it is in writing and signed by the parties."

The agreement provided the following terms of "Compensation." "As compensation for the personnel provided by PI to [Pedes] at the Offices under this Agreement, [Pedes] shall pay PI the hourly rate set forth in Exhibit A, which is attached to this Agreement and is incorporated by reference into it. Notwithstanding the above, [Pedes] shall also be responsible for paying to PI any overtime payments related to the personnel set forth in Exhibit B. In addition, [Pedes] shall be responsible for paying to PI the pro rata portion of any vacation time and benefits for the personnel set forth in Exhibit B."

The agreement contained an integration clause. "15. Entire Agreement. This Agreement contains all of the terms and conditions agreed upon by the parties with respect to the subject matter thereof. No other understanding, oral or otherwise, regarding the subject matter of this Agreement, shall be deemed to exist or to bind the parties."

Exhibit A is one typed paragraph, titled, "COMPENSATION." It provided, "As compensation for the services provided by PI to [Pedes] under this Agreement, [Pedes] shall be invoiced by PI to [Pedes] monthly, and [Pedes] shall pay PI the following hourly rates for the personnel set forth in Exhibit B." It added the "fees" were due the first of each month, and Pedes was responsible for paying "any applicable overtime payments[,] . . . benefits[,] and vacation time . . . ."

Exhibit B was a chart that identified 25 persons by name and job title. Next to each name were six columns. The first column, titled "RATE," listed a dollar amount next to each name. For example, the lowest paid personnel included two receptionists ($15-$16), two managers ($20), and a scheduler ($20). Next on the pay scale were a medical assistant ($24), two "Tech" personnel ($25-$39), and a radiologist ($45). There were 10 nurses earning an hourly rate of between $45 to $52. The next highest paid person was an "administrator" earning $10,300. PI's three co-owners/physicians (Arata, Harris, and Hewett) each had listed a rate of $10,000. And finally there were two "non-shareholder" physicians, Dipak Ranparia and Edward Neymark (earning $30,000 and $37,000 respectively.)

Next to the "RATE" column were five additional columns, each having the name of a different company ("PI", "Synergy", "Pedes", "OCSC", and "PMI"). These columns contained various percentage figures. For example, next to one receptionist it showed 25 percent in four columns relating to PI, Synergy, Pedes, and OCSC. The fifth column representing PMI was blank. Whereas, the second receptionist showed a 100 percent figure in PI's column and all the others were blank. The administrator, Frances

DeBarge-Igoe (DeBarge), had a percentage in each of the five columns, ranging from 15 percent to 25 percent.

In addition to DeBarge (spending 15 percent of her time working for Pedes), there were a total of three other PI employees listed on the chart as spending a percentage of time working for Pedes. There was one receptionist (earning $16) and spending 25 percent of her time with Pedes. There was also one "scheduler" and one "manager," each earning $20, and spending 100 percent of their time with Pedes. Also listed was Pedes's primary shareholder, Hewett, listed as earning $10,000 and working 40 percent of his time at Pedes. The other 20 PI employees listed on Exhibit B's chart were working for the other medical companies (PI, Synergy, OCSC, and PMI).

C. The Opposition

PI argued there were two agreements in place between PI and Pedes. First, was the oral PSA requiring Pedes to pay 15 percent of Pedes's collections for services provided by PI's physicians to Pedes's patients. Second, was the written Payroll Agreement, in which Pedes agreed to pay the hourly rates of clerical and clinical staff. It argued there was nothing in the Payroll Agreement that "altered, amended, or changed the PSA."

In support of the opposition, Harris declared he was a physician and one of the three shareholders in PI. Harris stated he was familiar with PI's business dealings, including its contracts with Pedes. He recalled that when Pedes began its operations in January 2012, PI entered into the oral PSA with Pedes to "supply doctors to Pedes to perform medical procedures for Pedes'[s] patients." In return, Pedes agreed to pay 15 percent of the amount collected for those procedures from the patients or third-party payors. Harris recalled that initially Arata provided services to Pedes's patients.

At some point later in the relationship, Goldstein began performing medical procedures for Pedes's patients. To support PI's theory the scope of the Payroll Agreement was limited to certain employees and did not impact the preexisting oral PSA

regarding how to compensate physicians, Harris submitted two e-mails prepared by PI's and Pedes's administrator, DeBarge, who was responsible for tracking and calculating the amount Pedes owed PI. In her e-mails, DeBarge discussed the status of PSA payments in April and May 2013.

Her April 26, 2013, e-mail to Harris, Arata, and Hewett was titled "PI - Pedes Reconciliation." It stated, "The attached spreadsheet reflects all monies collected by PI and PSA fees due from Pedes. All accounts have been reviewed and Pedes has not paid PI for PSA services. Please review and approve the payment from Pedes."

The second e-mail, dated May 2, 2013, was sent to the same three co-owners. It stated, "[Hewett] and I reviewed all reconciliation data. The amount is agreed as noted in spreadsheet. Pedes will transfer $50,000 today. The balance will be transferred June 1. Pedes will now pay 15 [percent] PSA based off MPMR invoices that are confirmed with deposits by Monique."

Harris also attached to his declaration an e-mail dated April 11, 2014. He and Arata sent this e-mail to Hewett and members of Pedes's board of directors. It stated the April 2 payment to PI for Goldstein's services to Pedes under the PSA "was unilaterally withdrawn from our bank" without any prior notification. Harris stated Hewett made the withdrawal "due to a discrepancy between what was initially transferred on April 2nd and what . . . Hewett has since calculated to be the correct PSA payment. With this reversal of payment, PI will not be able to pay payroll which includes staff that Pedes relies on daily for the function of their corporation."

PI argued these e-mails proved Pedes understood there were two separate compensation agreements in place, and Pedes was making two payments in accordance with both. PI maintained the lawsuit arose solely out of the PSA because it was based on money owed for Goldstein's services performed prior to April 2014. PI disagreed with Pedes's argument the PSA was somehow subsumed in or replaced by the Payroll

Agreement. It maintained, "That is simply not the case, as the PSA (1) predated the Payroll Agreement; (2) applied to services not covered by the Payroll Agreement; (3) covered the services of . . . Goldstein, who was not listed in nor covered by the Payroll Agreement; and (4) provided a payment mechanism not contained in the Payroll Agreement. In addition, Pedes continued to pay to PI the 15 [percent due money collected from third parties] long after the Payroll Agreement took effect."

PI concluded the two different contracts reflected the reality that a physician does not charge an hourly rate for his or her services and physicians required a fee structure based on the particular treatment provided. For example, an insurance company may agree to pay only $20,000 for an angioplasty procedure, regardless of the time it might take to complete the procedure. The parties agreed Pedes would pay 15 percent of the amount collected for procedures performed by PI physicians. In contrast, PI's clerical and administrative employees were paid by the hour to help run Pedes's business, and some of PI's personnel worked for several different clinics in addition to Pedes. The Payroll Agreement simply clarified Pedes was only responsible for paying its percentage of these individuals' salaries, overtime, and benefits.

D. The Reply Brief

Pedes again asserted the oral agreement was "memorialized in and superseded" by the written Payroll Agreement. It offered three arguments.

First, Pedes maintained there is nothing in the Payroll Agreement that stated it did not apply to professional services provided by physicians. The agreement referred to "clerical and clinical personnel" listed in Exhibit B. The term "clinical" could include the professional services provided by physicians. In addition, Exhibit B listed many medical professionals, including nurses and physicians. Pedes paid hourly rates to those employees compensated in that manner, and 15 percent of monthly net collections for those employees having a "monthly rate identified [in] Exhibit B." Pedes concluded

that if the Payroll Agreement was not intended to apply to professional services, there would be no need to include the term "clinical."

Second, Pedes asserted it did not matter Goldstein was not specifically identified in Exhibit B. They maintained the written contract took effect eight months before PI hired Goldstein. The agreement provided the chart in Exhibit B would be automatically amended whenever additional personnel were provided to Pedes.

Third, Pedes noted the Payroll Agreement had an integration clause stating it contained all the terms and conditions of the parties' agreement. It covered the payment of services provided by "clinical personnel" such as Goldstein. Therefore, PI's collection action fell within the scope of the written agreement.

To support its position, Pedes offered a supplemental declaration prepared by Hewett. He declared Harris was wrong about the number of PI's doctors who provided services to Pedes under the PSA. Hewett recalled that although Arata was the primary physician, Harris and Hewett also provided professional services.

Hewett stated the parties, during negotiations, agreed the written agreement would supersede the oral PSA, and this is evidenced by the fact the agreement executed in October 2012, established an effective date of January 2012 (the same day the oral PSA was entered into). The Payroll Agreement included the compensation of "clinical" personnel and Harris understood this term included medical professionals who provided treatment to patents. This understanding was "underscored by the fact" medical doctors were listed in Exhibit B. Hewett stated that after the written agreement was executed, all the parties "continued to refer to the written agreement as the 'PSA' because they are both one and the same."

Hewett also disputed Harris's claim Goldstein replaced Arata as the primary physician before the Payroll Agreement was executed and his name should have been included on Exhibit B if it applied to him. He explained Exhibit B listed Arata as devoting 100 percent of his time for Synergy, yet this was not what happened. After the

agreement was executed, Arata spent the majority of his time working for Pedes, who paid him 15 percent of the monthly net collections for his services. Goldstein replaced Arata in June 2013 not 2012, which explained why his name was not included on Exhibit B. Hewett attached several documents to his declaration to support his recollection Goldstein started working in June 2013. In his declaration, Hewett concluded there was no need to amend Exhibit B when Goldstein started working for Pedes because the contract provided it would be amended automatically whenever PI added new personnel.

Hewett added, "Pursuant to Exhibit 'B' of the [Payroll Agreement], . . . Arata (as well as . . . Harris and I) were guaranteed payment by PI at the rate of $10,000 per month for providing services on behalf of PI, whether it be for Synergy or Pedes or OCSC or PMI . . . . When using those services, it was understood between . . . Harris, on behalf of PI, and me, on behalf of Pedes, that Pedes would continue to pay for services provided by the medical doctors under the [Payroll Agreement] at the rate of 15 [percent] Pedes'[s] monthly net collections for services as described in paragraph 2, above." Paragraph 2 described the terms of the oral PSA agreement entered into January 2012.

Hewett explained, "[The above described] payment was used as a way of allocating the amount of that $10,000 (and any bonus) to be paid by the entity receiving the services from the doctors. The other personnel were paid at the rate, subject to whatever applicable allocation, as set forth in Exhibit 'B' to the [Payroll Agreement]."

Pedes filed evidentiary objections to portions of Harris's declaration. PI did not file evidentiary objections to Hewett's declaration.

E. The First Hearing

At the first hearing on the motion to compel arbitration, the court directed the parties to provide supplemental briefing. It noted Hewett declared Pedes continued to pay the 15 percent due under the PSA after execution of the Payroll Agreement, which was contrary to Pedes's prior position on the matter. Because the information was made

in the reply brief, PI did not have the opportunity to address it in the opposition. Accordingly, the court requested supplemental briefing.[1]

F. Supplemental Briefing

PI argued Hewett's admission "demonstrates that the oral PSA survived the execution of the Payroll Agreement." It maintained Hewett's sworn statement was consistent with the contemporaneous documents that also show Hewett understood the PSA survived the Payroll Agreement and "imposed an independent enforceable obligation on Pedes."

PI maintained the oral PSA terms were not subsumed in the Payroll Agreement because the obligation to pay 15 percent for physician services "is not found anywhere in the four corners of the Payroll Agreement, which is an integrated agreement." The obligation continued to exist as an independent obligation.

PI presented the following contemporaneous documents to further support its position. First, there was evidence the parties attempted to negotiate a written PSA agreement after the Payroll Agreement was signed. A draft of the written PSA was circulated in December 2012 before PI's shareholder's meeting. Minutes from that meeting show the shareholders had various issues with the drafted version of the agreement, including a new provision raising the amount of compensation to 17 percent. The minutes reflected the shareholders agreed it should remain at 15 percent. The written draft memorializing the PSA was also discussed in Pedes's January shareholder meeting. The minutes from that meeting contain the statement "PSA with [PI] is 15 [percent] of collections." PI argued this suggested Pedes treated the PSA payment as separate from its obligation for staff covered by the Payroll Agreement. Harris stated in a supplemental

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[1] In its opening brief, Pedes quotes from the tentative ruling prepared for this hearing. However, the ruling was not included in our appellate record. The minute order does not mention it, and it does not appear to have been adopted by the court. Instead, the court requested supplemental briefing and rescheduled the hearing.

declaration that the parties discussed the draft PSA "well into 2013." PI submitted several e-mails in which Hewett acknowledged Pedes's obligation to pay 15 percent of its collections for professional services under the terms of the PSA. PI argued, "this undercuts any notion" the terms of the PSA was subsumed by the Payroll Agreement.

PI also submitted DeBarge's declaration to support its position. DeBarge, a registered nurse, confirmed she was employed as PI's administrator from January 2011 to July 2014. In this capacity, she was "responsible for the day-to-day operations of PI, including its accounting, accounts receivable, and human resource functions."

DeBarge declared that while employed by PI, she also served as the administrator for the other entities owned by PI's three shareholders (Harris, Arata, and Hewett), including "Synergy Health Concepts PC, Pacific Medical Innovations, LLC[,] and Newport Surgery Center, LLC." In addition, she worked as the administrative contact between those entities and Pedes between January 2012 and April 2014. DeBarge stated Pedes used her and other employees on a part-time basis to perform administrative tasks such as billing and scheduling. Pedes reimbursed PI for the time she worked for Pedes.

DeBarge stated she worked with PI's attorney to prepare the contract the parties now refer to as the Payroll Agreement. DeBarge declared she was responsible for drafting Exhibit B, which became part of the Payroll Agreement. She listed all the PI employees in place as of October 2012, and created the chart listing the percentage of time each employee was to work for PI, Pedes, and other entities. In the list, she included Hewett (majority owner of Pedes) in addition to four other PI employees as working for Pedes as follows: (1) herself as administrator (15 percent); (2) Kristin Cimino as receptionist (25 percent); (3) Crystal Conrad as scheduler (100 percent); and (4) Jessica Loza as manager (100 percent). She explained, "With the exception of . . . Hewett, the percentages indicated the amount of each person's salary for which Pedes was responsible."

DeBarge recalled, "Any medical procedures that PI doctors performed for Pedes'[s] patents were governed by a separate [PSA]. I know this because I was responsible for overseeing PI's calculations of the amounts owing from Pedes and tracking the payments made by Pedes to PI under the oral PSA." DeBarge stated that from January 2012 to July 2014, "Pedes always made two payments to PI." One payment was under the terms of the Payroll Agreement for Pedes's share of the salaries for the administrative personnel. The other was for 15 percent of the amount Pedes collected from third parties for medical/surgical procedures PI doctors provided to Pedes's patients pursuant to the PSA.

In the fall of 2012, DeBarge said she was responsible for working with PI's attorney to "develop a formal written PSA to replace the oral agreement" and she attached to her declaration a copy of one of the draft agreement she circulated to Hewett, Arata, and Harris in December 2012. DeBarge stated one of her responsibilities was to take minutes of the shareholder meetings. She attached the minutes she took at PI's December 2012 meeting and Pedes's January 2013 shareholder meeting. The December minutes reflect the shareholders had issues with the drafted PSA that provided for an increase of 17 percent collected for medical services. The January minutes reflected the PSA terms were discussed.

In its supplemental briefing, Pedes argued there was nothing in PI's opposition that should change the court's tentative ruling to grant the motion compelling arbitration. It asserted basic rules of contract interpretation must lead one to the conclusion the Payroll Agreement covered compensation for clerical and clinical personnel, which included PI's doctors and nurses. In addition, Pedes asserted PI's theory was inconsistent with the parol evidence rule, which prohibited the introduction of extrinsic evidence to vary the terms of an integrated written contract. It disagreed with PI's interpretation of Hewett's declaration, maintaining Hewett explained the Payroll

Agreement was intended to replace and supersede the prior oral agreement. Pedes filed objections to Harris's supplemental declaration and DeBarge's declaration.

G. The Court's Ruling

The court denied the motion to compel arbitration. It reasoned Pedes "failed to carry its burden of establishing that [its] claims [fell] within the scope of the arbitration provision" set forth in the Payroll Agreement. It agreed with PI's argument there were two separate agreements. It explained, "In particular, [Hewett's supplemental declaration and DeBarge's declaration] provide evidence of an oral agreement for 15 [percent] net collections that is not provided for within the written [Payroll Agreement]. [Hewett] concedes that an oral agreement for 15 [percent] net collections for medical services pre-dated the [Payroll Agreement], and it is almost inconceivable that if the [Payroll Agreement] was intended to subsume the [PSA] and the 15 [percent] net payables there under, it would have been entirely silent as to the 15 [percent] obligation. Instead, the court concludes that the only way the language of the [Payroll Agreement] and the actual conduct of the parties can be reconciled is by a finding that 'clinical personnel' as used in the [Payroll Agreement] was *not* intended to include the services provided initially by [Arata,] and thereafter by [Goldstein]. Those services were covered by the separate oral agreement, and [PI's] claims relate only to those services. In reaching these conclusions, the court finds the declaration of [DeBarge] much more credible and persuasive than the inherently contradictory and self-serving declarations of [Hewett]." The court also ruled on Pedes's evidentiary objections. (We have omitted from this opinion the portions of the declarations to which the court sustained the objections.)

II

"California courts 'have consistently found a strong public policy favoring arbitration agreements.' [Citation.] 'Although "[t]he law favors contracts for arbitration of disputes between parties" [citation], "'there is no policy compelling persons to accept

arbitration of controversies which they have not agreed to arbitrate . . . .'" [Citations.]' [Citation.] 'The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement. [Citations.] Petitions to compel arbitration are resolved by a summary procedure that allows the parties to submit declarations and other documentary testimony and, at the trial court's discretion, to provide oral testimony. [Citations.] If the facts are undisputed, on appeal we independently review the case to determine whether a valid arbitration agreement exists. [Citations.]' [Citation.]" (*Goldman v. Sunbridge Healthcare, LLC* (2013) 220 Cal.App.4th 1160, 1169.) Insofar as the trial court's order is based on findings of material fact, we apply a substantial evidence standard. (*Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1127-1128.) "We apply general California contract law to determine whether the parties formed a valid agreement to arbitrate." (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 89.)

Because the trial court's decision in this case was based upon the resolution of disputed facts, we adopt the substantial evidence standard of review. "'In such a case we must "'accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of the credibility of witnesses and the weight of the evidence.'" [Citation.]' [Citation.]" (*Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348 (*Hotels Nevada*).)

A. Substantial Evidence Supports the Trial Court's Ruling

As mentioned above, "The trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination" on whether there is a valid agreement to arbitrate. (*Banner Entertainment, Inc. v. Superior Court (Alchemy Filmworks, Inc.)* (1998) 62 Cal.App.4th 348, 356-357.) Here, the relevant evidence was

the Payroll Agreement, several conflicting declarations, and other supporting documents. On one hand, Hewett attested the parties intended to integrate the PSA into the Payroll Agreement. On the other hand, Harris and DeBarge declared the parties intended the two agreements to remain separate and independently enforceable.

The court concluded DeBarge's declaration more credible than Hewett's declaration, concluding Hewett's declaration was "inherently contradictory and self-serving." Substantial evidence supported the court's determination. DeBarge's declaration was accompanied by documentation establishing the parties' conduct and practice confirmed her and Harris's statements there were two separate agreements. Hewett's declaration was not supported by any additional documentation showing the agreements merged. Moreover, we agree with the court's assessment Hewett's declaration contained several self-serving statements. Although PI did not file formal written objections to Hewett's declaration, we found it suffered from many of the same issues as portions of Harris's declaration, and we must assume the trial court also recognized these problems. In light of all of the above, we have no basis to disturb on appeal the trial court's credibility finding.

On appeal, Pedes attacks the relevance of DeBarge's declaration, maintaining it "suffers from a number of infirmities but it is particularly incompetent because it is not based on her personal knowledge of the parties' intentions when contracting" and contained improper conclusions and opinion as to the legal effects of the agreements. Pedes asserts the court improperly overruled its objections to these portions of DeBarge's declaration before the hearing.

Pedes asks this court to consider anew the admissibility of the following two statements contained in DeBarge's declaration: (1) "Any medical procedures that PI doctors performed for Pedes'[s] patients were governed by a separate [PSA];" and (2) "From January 2012 until July 2014 when I stopped working for PI, Pedes always made two payments to PI. One payment was under the Payroll Agreement for Pedes'[s]

share of the salaries of the administrative personnel used by it pursuant to that agreement. The other payment was for 15 [percent] of the amount Pedes collected for medical and surgical procedures that PI doctors provided to Pedes'[s] patients pursuant to the PSA."

The rules governing evidentiary objections are clear in the context of summary judgment motions and anti-SLAPP motions. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 531-532 [motion for summary judgment]; *Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1480, fn.7 [anti-SLAPP case].) However, there are no rules regarding evidentiary objections made in connection with other types of motions. Indeed, trial courts may choose to consider or ignore written objections. In any event, in this case we adopt the same abuse of discretion standard of review used for evidentiary rulings made in summary judgment and anti-SLAPP motion cases (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444), and find none.

Pedes asserted the two statements represent opinion testimony because DeBarge was not a party to the agreements, not an owner of any of the companies involved, and was not present during negotiations. We conclude DeBarge's deposition contained information based on her personal knowledge as the head administrator of both PI and Pedes. DeBarge explained she was responsible for the "day-to-day" operations of the two companies, including accounting, accounts receivable, and human resources. She calculated and tracked the amount of money Pedes owed PI. DeBarge assisted in drafting the Payroll Agreement and also drafted Exhibit B. She designated the percentage of time each PI administrative employee would be working for Pedes (and there were only three). As the "main administrative contact" between the parties, she was the person most knowledgeable on how the two parties were actually performing under the terms of the contracts. Her opinion PI's doctors who performed services for Pedes's patients were governed by the separate PSA was based on her personal experience calculating the amount Pedes owed under the terms of the PSA for those services. In her declaration, she never suggested she knew the parties' intent when the contract was formed. Her

statements were based on their performance of the contract, from which reasonable inferences can be raised about their genuine intent.

Contrary to Pedes's contention, DeBarge's understanding administrative staff was compensated pursuant to the written Payroll Agreement was not an improper legal conclusion. She personally tracked and made sure PI was paid for those services in accordance with the express terms of that contract. The court could reasonably accept and find more credible DeBarge's explanation regarding the purpose and use of Exhibit B than Hewett's statements because DeBarge was the one who drafted Exhibit B and was the one who computed and reconciled who was to be paid, their rate of pay, and compliance with the obligations listed in the Payroll Agreement. It cannot be said it was an abuse of discretion for the trial court to consider and rely on DeBarge's declaration.

Moreover, DeBarge's statements were supported by other evidence. Harris and Hewett agreed there were different calculations to pay two categories of PI personnel. Clerical/administrative staff received an hourly rate or specific salary for the actual time working for Pedes. In contrast, medical professionals were paid a percentage of the amount collected for their services to patients. Thus, the PI receptionist working 100 percent of the time for Pedes was paid $16 an hour and PI's physicians were paid 15 percent of lump sum payment collected from a patient's insurance or Medicare, i.e., 15 percent of $20,000 for an angioplasty procedure. Physicians, such as Goldstein, were never paid an hourly rate for their services.

In addition to the evidence contained in DeBarge's declaration, the trial court properly evaluated and compared the scope of the PSA, the terms of the Payroll Agreement, and the parties' conduct. The parties agreed the oral agreement for 15 percent net collections for medical services *predated* the Payroll Agreement. As aptly noted by the trial court, the parties' actual conduct cannot be reconciled with the notion the scope of the later Payroll Agreement included physician compensation rates.

Certainly, by its plain meaning, "clinical personnel" could include doctors. But it could also include other hourly wage clinical personnel such as nurses and medical technicians. Basic rules of contract interpretation require us to view the term in the context of the clear purpose of the Payroll Agreement, which was to define Pedes's obligation towards the "hourly rate" personnel. As noted in Hewett's declaration, PI physicians were not paid like hourly employees, but were funneled 15 percent of money collected from third parties (insurance, Medicare, and patients). Their compensation required a completely different set of procedures and processes than the typical payroll accounting methods used for hourly employees. Yet, the Payroll Agreement offered no guidelines or rules about how, when, or where the 15 percent would be collected, the time line for expected distribution, or any method for audits or inspections of Pedes's collection records. Hewett declared the physicians received a "guaranteed" base salary plus bonuses. Noticeably missing from the Payroll Agreement is any express promise of a minimum salary for physicians or the expectation of bonuses for any of PI's employee (whether they be paid a salary or by the hour). It is highly improbable such material terms would be omitted if the parties intended to merge the existing oral agreement into a new written agreement. We agree with the trial court's assessment that it is unbelievable the parties intended a merger when there is no mention in the written agreement of Pedes's promise to pay 15 percent of collected money, but it contains multiple provisions describing the payment scheme for hourly wage employees. In conclusion, the tracking methods and compensation requirements for PI's physicians were complicated. The complete omission of this complex multi-faceted payment scheme from the Payroll Agreement, the parties' continued reference to the PSA payment obligation after executing the Payroll Agreement, and Pedes's action of making two separate payments, all support the conclusion the two agreements were not merged.

We also find significant DeBarge's statement that after the Payroll Agreement took effect the parties began drafting a written version of the PSA to

memorialize the terms for paying PI's physicians. Attached to DeBarge's declaration were board meeting minutes and e-mails supporting her recollection. Pedes did not offer any evidence to contradict her statements about the proposed written version of the PSA. Approximately six pages of the drafted agreement were devoted to delineating the procedures, promises, and conditions required for paying PI's physicians (which as mentioned earlier are not terms included in the Payroll Agreement). Drafting, circulating, and discussing a proposed written version of the PSA are all actions inconsistent with Pedes's notion the PSA terms were already merged into the Payroll Agreement.

In their briefing the parties also discuss the four e-mails Harris attached to his declaration. They were written to Hewett and others, and referred to Pedes's obligation under the PSA. Pedes objected to these e-mails on the grounds they were irrelevant to show the oral agreement continued to exist after the Payroll Agreement was executed. Pedes acknowledges the court overruled its objections and notes the trial court never indicated it relied on these e-mails in making its ruling. Nevertheless, Pedes asserts the e-mails should not have been considered competent evidence because Harris did not testify to any facts showing PSA "meant anything other than the existing written agreement, which had been executed long before the date of these e-mails, or that it in fact meant that an oral agreement still existed." In essence, Pedes's argument on appeal is limited to whether it was reasonable to infer from these e-mails that Hewett (on behalf of Pedes) and Harris (on behalf of PI) understood the PSA oral agreement was still in effect and separate from the Payroll Agreement. Pedes has abandoned its argument the e-mails themselves were inadmissible. Pedes suggested the only permissible inference is the parties referred to the PSA *as being part* of the written Payroll Agreement.

As stated earlier in this opinion our review is limited. Because the trial court's decision in this case was based upon the resolution of disputed facts, we adopt the substantial evidence standard of review and we """"must presume the court found every

fact and drew every permissible inference necessary to support its judgment, and defer to its determination of the credibility of witnesses and the weight of the evidence.'" [Citation.]' [Citation.]" (*Hotels Nevada, supra,* 203 Cal.App.4th at p. 348.) Substantial evidence supports the reasonable inference the parties were discussing and referenced two separate agreements applicable to determining the amount of money Pedes owed PI. If the two had been merged, one would expect the parties to be referring to only the one operative agreement. There would be no need to discuss two. Moreover, DeBarge explained she tracked and calculated two payments to PI, with one representing money owed pursuant to the oral PSA and the other based on the terms of the written Payroll Agreement. The court did not need additional information to make the reasonable inference the e-mails were discussing the two separate agreements.

B. Contract Interpretation Rules and the Parol Evidence Rule

Applying ordinary rules of contract interpretation, Pedes argues the court erred in finding the Payroll Agreement did not cover the compensation of all PI personnel provided to Pedes at the medical clinic. It points to the plain language that provides the scope of the agreement covers both "clerical and clinical personnel." The contract also references Exhibit B, containing a list of PI administrative personnel, nurses, medical technicians, and physicians. Pedes maintained the ordinary and commons sense interpretation of the term "clinical personnel" must include physicians. It concludes PI's collection action concerning compensation for a physician's services is covered by the Payroll Agreement and the arbitration provision. For the reasons previously stated in our opinion, the term "clinical personnel" does not clearly include physicians when it is read in the context of the entire agreement and viewed in light of undisputed evidence physicians are compensated differently than other PI employees. Applying basic rules of contract interpretation, it is not difficult to conclude the term as used in this agreement is ambiguous and we should not limit our analysis to the four corners of the agreement.

Instead, we turn our attention to Pedes's chief complaint about the trial court's use of parol evidence when interpreting the terms and scope of the written contract.

Although Pedes relies on parol evidence to make its argument the parties intended the agreements to merge, Pedes argues on appeal that it was improper for the trial court to rely on PI's parol evidence in determining the PSA was a collateral and separate agreement. Pedes asserts it is undisputed the Payroll Agreement was an integrated agreement, expressly providing, "No other understanding, oral or otherwise, regarding the subject matter of this Agreement, shall be deemed to exist or to bind the parties." For this reason, Pedes maintains the court should have barred any evidence of an oral agreement pursuant to the parol evidence rule. It reasons that because it is "unquestionably clear from the words of the written agreement that it involves exactly the same subject matter as the oral agreement" it ceased to exist once the written agreement was executed. Pedes asserts the parties adopted the Payroll Agreement as "the final and complete expression of their agreement for PI to provide clinical personnel to work for Pedes." We disagree and conclude the trial court correctly determined the Payroll Agreement was not intended to be a final written expression of the terms and subject matter of the PSA. The oral agreement concerning compensation for PI's physicians was a separate and collateral agreement.

"The parol evidence rule will exclude evidence of a prior or contemporaneous agreement that contradicts the terms of an integrated writing. [Citation.] The parol evidence rule is a substantive rule of contract law, and whether the rule applies is a question of law. [Citation.] If the parol evidence rule is raised as a bar, the party proffering the parol evidence must show the writing was not intended to be the complete agreement of the parties, and that the agreement is susceptible to the meaning proffered. [Citation.] Where the parties execute a written agreement following negotiations, the agreement is at least partially integrated and parol evidence may only be introduced to prove additional terms of the contract which are consistent with the express

language of the written agreement. [Citation.] In applying the rule, courts employ a two-step process to determine whether (1) the writing is an integration and (2) the collateral agreement is consistent with the written agreement. [Citation.]" (*Take Me Home Rescue v. Luri* (2012) 208 Cal.App.4th 1342, 1351 (*Take Me Home Rescue*).)

"Thus, the central issue here is 'whether the parties *intended* the written instrument [(the Payroll Agreement)] to serve as the exclusive embodiment of their agreement.' [Citation.] '"The instrument itself may help to resolve that issue. It may state, for example, that 'there are no previous understandings or agreements not contained in the writing,' and thus express the parties' 'intention to nullify antecedent understandings or agreements.' [Citation.]" [Citation.] Indeed, if such a clause is adopted and used by the parties, it may well be conclusive on the issue of integration. [Citations.]' [Citation.] . . . '[I]n order to resolve this threshold issue, the court may consider all the surrounding circumstances, including the prior negotiations of the parties. [Citation.] "In determining the issue, the court must consider not only whether the written instrument contains an integration clause, but also examine the collateral agreement itself to determine whether it was intended to be a part of the bargain. [Citations.] However, in determining the issue of integration, the collateral agreement will be examined only insofar as it does not directly contradict an express term of the written agreement; 'it cannot reasonably be presumed that the parties intended to integrate two directly contradictory terms in the same agreement.' [Citation.] In the case of prior or contemporaneous representations, the collateral agreement must be one which might naturally be made as a separate contract, i.e., if in fact agreed upon need not certainly have appeared in writing. [Citation.]"' [Citation.]" (*Take Me Home Rescue, supra,* 208 Cal.App.4th at pp. 1351-1352.)

For example, in the *Take Me Home Rescue* case, a pet foster care agreement only provided instructions for the foster dog's care. (*Take Me Home Rescue, supra,* 208 Cal.App.4th at p. 1352.) It did not include the material term that the dog would either be

spayed prior to adoption or returned. (*Ibid.*) However, the party adopting the dog separately orally agreed the animal "would be spayed as soon as she was well enough to tolerate the procedure." (*Ibid.*) Based on these facts, the court concluded "the foster care agreement did not contain the entire agreement of the parties, and was only partially integrated." (*Ibid.*) The dog owner could not rely "solely on the terms of the parties' written agreement to escape the spaying requirement because the separate oral agreement does not contradict the terms of the foster care agreement—which provides only directions for the dog's care." (*Ibid.*)

Another instructive case is *Wright v. Title Ins. & Trust Co.* (1969) 274 Cal.App.2d 252. In that case, equal co-owners of an incorporated car dealership entered into a written agreement giving each owner an option to purchase full ownership upon the death of the other owner. (*Id.* at p. 254.) They also entered into an oral agreement that each would buy a life insurance policy worth $40,000, and name the other as beneficiary. (*Id.* at pp. 254-255.) Only one of the owners bought the policy, and when the other owner died, the policy owner sued the decedent's estate, seeking damages arising from the loss of insurance proceeds and the inability to obtain full ownership of the dealership. (*Id*. at p. 255.) The court allowed evidence of the oral agreement and a jury entered a verdict in plaintiffs' favor. On appeal, the estate argued evidence of the oral argument was precluded by the parol evidence rule, arguing that if the parties intended to require the purchase of mutual life insurance policies, the provision would have been included in the written agreement. The appellate court affirmed the judgment, concluding the oral agreement to purchase life insurance was "separate, collateral, and consistent with the buy and sell agreement." (*Id*. at p. 260.)

Here, the parties entered into a Payroll Agreement concerning Pedes obligation to pay the hourly wage, vacation pay, and fringe benefits of PI's employees working for Pedes. The written agreement stated that "[t]his Agreement contains all of the terms and conditions agreed upon by the parties *with respect to the subject matter*

hereof. No other understanding, oral or otherwise, regarding the subject matter of this Agreement, shall be deemed to exist or to bind the parties." (Italics added.) Unlike the *Take Me Home* case, there was no conclusive language stating for example that, """"there are no previous understandings or agreements not contained in the writing""""" or an express intention to """"nullify antecedent understandings or agreements.""""" (*Take Me Home Rescue*, *supra,* 208 Cal.App.4th at p. 1352.) The written agreement was clearly limited in scope to its stated "subject matter," which was insuring the correct calculation and payment for hourly wage workers.

In the Payroll Agreement, Pedes agreed to pay directly for the hours and vacation owed to clerical and clinical staff earning an hourly wage. Whereas, the oral agreement concerned funneling a percentage of money *already paid for* by a third party. The two methods of compensation were nothing like each other. As described in more detail above, if the parties intended these two distinct methods to be memorialized in one written agreement, one would expect express provisions regarding the manner of collection, the processing of base pay, the structure of bonuses, and other conditions related to compensating physicians. We find it very telling that Hewett felt compelled to devote a large portion of his declaration to explaining the correct methodology. This obviously would not have been necessary if, as he claimed, the information fell within the scope of the Payroll Agreement. A more reasonable explanation is that the two agreements exist independently of one another.

In conclusion, none of the PSA promises and terms affected or contradicted the express terms of the Payroll Agreement. Although the Payroll Agreement is fully integrated with respect to the "subject matter contained in it," the parties did not by this integration clause intended to preclude an oral agreement involving a different subject matter. And because there was undisputed evidence the parties were taking steps to formally memorialize in writing the PSA's terms before the underlying dispute arose, we

conclude the trial court correctly determined the separate, collateral oral agreement was not barred by the parol evidence rule.

III

The order is affirmed. Respondent shall recover its costs on appeal.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.